

COMMITTEE CONFERENCE
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:)	
)	
Application for Certification of)	Docket No.
the Los Esteros Critical Energy)	03-AFC-02
Facility 2, Phase 1)	PMPD
_____)	

CALIFORNIA ENERGY COMMISSION

HEARING ROOM A

1516 NINTH STREET

SACRAMENTO, CALIFORNIA

MONDAY, MARCH 14, 2005

10:07 a.m.

Reported by:
Peter Petty
Contract No. 170-04-001

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

COMMITTEE MEMBERS PRESENT

Jackalyne Pfannenstiel, Presiding Member

HEARING OFFICER, ADVISORS PRESENT

Ed Bouillon, Hearing Officer

Scott Tomashefsky, Advisor to Chairman Keese

Timothy Tutt, Advisor to Commissioner Pfannenstiel

STAFF AND CONSULTANTS PRESENT

Robert Worl, Project Manager

Dick Ratliff, Senior Staff Counsel

Gabriel Taylor

APPLICANT

Greggory L. Wheatland, Attorney
Ellison, Schneider and Harris, LLP
representing Calpine Corporation

Rick Tetzloff, Project Manager
Calpine Corporation

Steven A. DeYoung, Principal
DeYoung Environmental Consulting

INTERVENOR

Robert Sarvey
Californians for Renewable Energy

Rebecca Lucky
Silicon Valley Bicycle Coalition

ALSO PRESENT

Steve Hill
Bay Area Air Quality Management District

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1 P R O C E E D I N G S

2 10:07 a.m.

3 PRESIDING MEMBER PFANNENSTIEL: This is
4 the Committee Conference on Los Esteros Critical
5 Energy Facility Phase I. I'm Commissioner Jackie
6 Pfannenstiel. I'll be the Presiding Commissioner
7 for the completion of this proceeding.

8 To my right is Tim Tutt, my Advisor. To
9 my left is Ed Bouillon, the Hearing Officer. And
10 to his left is Scott Tomashefsky, who is the
11 Advisor to Chairman Keese, who isn't here.

12 First, we sort of apologize for the
13 strange configuration of the hearing room. I'm as
14 surprised as everybody else. I will make it work,
15 but it is a little strange to get started. But we
16 will get through the business and not let the
17 structure of the room bother us.

18 So, let me then turn over the proceeding
19 to Mr. Bouillon.

20 HEARING OFFICER BOUILLON: Thank you.
21 The way I'd like to do this is to start with the
22 staff's filed comments, a copy of which I have
23 just delivered to Mr. Sarvey. Apparently he did
24 not receive them by email. I assume -- the proof
25 of service does indicate that CARE was mailed a

1 copy, but that doesn't serve the purpose at this
2 point. But we will go through them one-by-one in
3 any event.

4 When we conclude that we will deal with
5 the applicant's comments. And when we conclude
6 that we will deal with CARE's comments.

7 Starting with the staff comments, at the
8 bottom of the first page they discuss biology-11
9 condition. And what they're proposing to change
10 is the description of a 55-acre parcel to a 34-
11 acre parcel. And I have reviewed the record and
12 determined that 34 acres is correct. And I would
13 cite exhibit 2, the AFC, at page 1-2, which does
14 talk about 34 acres. So that's simply a mistake
15 on our part, and that will be corrected in our
16 errata.

17 I'd like to go through these all and
18 then ask the parties if they have any other
19 comments about them.

20 The second matter deals with facility
21 design. And the staff has included, as appendix
22 A, a complete set of conditions that are in some
23 respects different than those contained in the
24 PMPD.

25 The reason for that is the Hearing

1 Advisor's Office had made a big mistake. We
2 attempted to include the conditions of
3 certification from the FSA, but somehow, through
4 our O drives and internet drives, incorporated the
5 current normally used conditions of certification
6 which are slightly different than the ones that
7 were tailor made by staff for this project.

8 They have included those in appendix A.
9 The Committee has reviewed those, and we have
10 determined that they are, in fact, more
11 appropriate than the ones in the PMPD. And the
12 errata will substitute appendix A conditions for
13 those contained in the PMPD.

14 Most important in those conditions. with
15 respect to actual or potential complications, is
16 the use of the 1998 building code instead of the
17 2001 building code. If we were to substitute a
18 condition of certification requiring compliance
19 with the 2001 building code I would imagine some
20 building code official in San Jose could come out
21 there and say you've got to bring this whole
22 project up to current code. That certainly was
23 not the intent of this Committee. And we do not
24 intend to make them do that. And that is why
25 we're going back to the conditions as specified in

1 the final staff assessment.

2 The next matter on page 2 dealing with
3 soils and water, at the bottom, the first item,
4 page 190, the second paragraph, we will accept
5 that as correct. The errata will reflect the
6 staff's comment. I would direct the parties to
7 see the final staff assessment, page 4.9-5. That
8 revision is more in the nature of typographical
9 revision than anything substantive.

10 The second item, soil and water
11 condition of certification 3, I have a comment I'd
12 like to ask the staff. Changing the permit number
13 3 to 33, is that simply a typographical error in
14 preparation of the FSA?

15 MR. WORL: It wasn't really clear from
16 our discussions with the Corps whether or not
17 three years ago it should have been 33 instead of
18 3 and 7. But they did make it clear in
19 discussions with staff that the extension of the
20 outfall would require compliance with nationwide
21 permits 7 and 33, as opposed to 3 and 7 as had
22 been in the original case.

23 So whether it was a typo three years ago
24 or not, I'm not sure. I never did get real
25 clarity on that. But the Corps was, in fact, very

1 clear that 7 and 33 were the correct nationwide
2 permits that would affect the extension of the
3 wastewater -- or the runoff outfall to Coyote
4 Creek proper, what they call the low-flow channel
5 as opposed to its current location.

6 HEARING OFFICER BOUILLON: Let me ask
7 both the applicant and CARE if they have any
8 difficulties if we were to substitute 33 for 3 in
9 the instances cited by staff?

10 MR. WHEATLAND: Good morning; I'm Gregg
11 Wheatland. I'm the attorney for the applicant.
12 And we are perfectly comfortable with identifying
13 7 and 33. We believe those are the correct
14 permits.

15 MR. SARVEY: Yeah, I would support staff
16 on that.

17 HEARING OFFICER BOUILLON: That will be
18 included in the errata also, then.

19 On page 199, the staff has asked to
20 include a sentence in the explanatory comment
21 which reads as follows: Following staff's last
22 consultation with the U.S. Army Corps of Engineers
23 the ACOE has since specified that nationwide
24 permits 7 and 33 will be needed for the stormwater
25 outfall as now reflected in condition 1 of soil

1 and water-3.

2 I'd like to ask staff if that comment is
3 something that occurred since the close of the
4 evidentiary hearings.

5 MR. WORL: No, sir, it did not. These
6 comments took place during the preparation of the
7 final staff assessment and that clarification just
8 didn't take place in time, or we didn't catch it
9 apparently.

10 But this took place several months
11 before the closure of the record.

12 HEARING OFFICER BOUILLON: All right;
13 given the lack of objection --

14 MR. WORL: And basically the comment
15 essentially is, again, a clarification that leads
16 to the substitution of 33 for number 3 in terms of
17 nationwide permit. It's really the same comment
18 in two different locations.

19 HEARING OFFICER BOUILLON: Given the
20 lack of objection expressed earlier by all the
21 other parties, unless they have a specific
22 objection to this explanatory comment, I believe
23 we can include it.

24 Mr. Wheatland, do you have any problem
25 with that?

1 MR. WHEATLAND: No objection.

2 HEARING OFFICER BOUILLON: Mr. Sarvey?

3 MR. SARVEY: No objection.

4 HEARING OFFICER BOUILLON: The next
5 matter on page 201, I would like -- with regard to
6 number A, the 3 and 33, we've discussed that
7 already. We can skip that one.

8 But B, I would like staff to explain
9 that for the Committee's better comprehension of
10 that change. I note that the matter is what was
11 in the FSA.

12 MR. WORL: Yes. In the original license
13 the construction of this outfall was under
14 considerable discussion between the Corps of
15 Engineers, the applicant, staff and the water
16 folks.

17 And one of the things that was unknown
18 at the time was whether or not the armoring, or
19 essentially the rock that protected the Coyote
20 Creek proper, was going to be adequate for the
21 increased flow or the redirection of the water,
22 wastewater -- not wastewater, but runoff water to
23 Coyote Creek proper.

24 Since that time staff has clarified that
25 the proper reference should not have been to the

1 scouring armor, which apparently was put to rest,
2 and also would be included in the temporary
3 construction aspect of the development of the
4 final outfall, but that temporary construction
5 access and the watering were the issues that would
6 be covered by the Corps permits and it would be
7 required by the Santa Clara Valley Water District
8 and staff in this instance.

9 And that was a more appropriate term
10 than directing the condition to deal solely with
11 the armoring to prevent scour in Coyote Creek
12 proper.

13 HEARING OFFICER BOUILLON: Mr.
14 Wheatland, do you have any objection to the
15 revision of that condition?

16 MR. WHEATLAND: No objection.

17 HEARING OFFICER BOUILLON: Mr. Sarvey?

18 MR. SARVEY: No objection.

19 HEARING OFFICER BOUILLON: Item C, the
20 verification is again the problem with 3 and 33.
21 We can skip that. Item D, it appears to me that
22 that is simply again a matter of 7 and 33, is that
23 correct, Mr. Worl?

24 MR. WORL: Yes. What we did is just
25 call to your attention each of the areas where we

1 had inappropriately referenced the original
2 licensing conditions 3 and 7, as opposed to 7 and
3 33, as directed by the Army Corps.

4 HEARING OFFICER BOUILLON: And with
5 respect to the next item, socioeconomics, the
6 staff is recommending that we include the words
7 local and regional labor force.

8 The Committee notes that in the AFC,
9 which is exhibit 2, at page 8.10-4 the applicant
10 anticipates that the construction and operating
11 workforce can come from the County. I don't know
12 what staff intends to indicate by regional. But
13 it seems to me that a county workforce is a local
14 workforce.

15 So, Mr. Worl, do you have anything to
16 add?

17 MR. WORL: Additional, in doing the
18 socioeconomic analysis Dr. Diamond and Dale
19 Edwards, who came forward and sponsored the
20 additional change during the FSA, indicated that
21 some of the labor force actually was coming from
22 outside the County. That the potential was there
23 to attract from a larger source than just Santa
24 Clara County.

25 Since the project is right on the border

1 of an additional county, it was felt that regional
2 better described the potential actions of
3 construction employment and operations employment,
4 too, I would imagine, on this area that the
5 addition of a regional, or the "and regional" was
6 essentially a means of recognizing that the
7 project is on the border of -- essentially near
8 the border of an additional county.

9 HEARING OFFICER BOUILLON: Is that
10 recommendation contained in the final staff
11 assessment?

12 MR. WORL: I believe that it is. It was
13 certainly added to the condition, or was intended
14 to be added to the condition, and one of the
15 reasons that we added another author to the
16 socioeconomic section when Mr. Edwards sponsored
17 this particular change.

18 HEARING OFFICER BOUILLON: We will take
19 that matter under submission and I will re-examine
20 the FSA in that regard.

21 Turning to the applicant's comments now.
22 Going to page 7 of the PMPD, there was a mistake
23 on the part of the Hearing Office that should read
24 one 18-inch diameter line, as described in the AFC
25 exhibit 2 at page 7-2. That will be corrected in

1 the errata.

2 With regard to page 15, that is also a
3 Hearing Office error. It is an easement, not a
4 parcel. And it has been purchased by and not
5 leased by Calpine. And I would refer to the
6 record at the FSA page 3-2, which contains that
7 information.

8 Turning to page 16, again it should
9 indicate, the last bulleted item, one 1500-foot
10 line. And page 58 --

11 MR. WHEATLAND: If I may interject,
12 please.

13 HEARING OFFICER BOUILLON: Excuse me?

14 MR. WHEATLAND: If I may interject with
15 respect to this condition gen-1. The comments by
16 the staff addressed the same issue that we're
17 attempting to address here. We concur completely
18 with the recommendations the staff is making
19 regarding facility design. And the staff's
20 proposal will resolve the issue we've raised here.

21 HEARING OFFICER BOUILLON: Yes, on page
22 58. That's what I was going to say actually.

23 MR. WHEATLAND: Okay.

24 HEARING OFFICER BOUILLON: On page 84
25 the AFC at page 5-1 says will be installed. Is

1 there any evidence in the record that it has been
2 installed? I notice that the applicant referred
3 to an email from Lance Shaw to, I suppose, the
4 applicant, that it had been installed. But I do
5 not know that that's part of the record, or even
6 an official --

7 MR. WHEATLAND: No, it's not part of the
8 evidentiary record. The statement that it will be
9 installed was correct at the time the AFC was
10 filed. Since that time the installation has been
11 made. It's part of the Commission's compliance
12 record, but not part of the evidentiary record of
13 this proceeding.

14 But Mr. Shaw is, I think, here today,
15 and could perhaps help to clarify that issue.

16 HEARING OFFICER BOUILLON: Are the
17 parties prepared to stipulate that an errata can
18 be filed to indicate that the switch has been
19 installed? I'm the staff is, if it was Lance
20 Shaw's email. I'd ask Mr. Sarvey if you have any
21 problem with that?

22 MR. SARVEY: I don't have any problem
23 with it.

24 HEARING OFFICER BOUILLON: Mr. Ratliff,
25 are you prepared to so stipulate?

1 MR. RATLIFF: Yes.

2 HEARING OFFICER BOUILLON: Mr.

3 Wheatland?

4 MR. WHEATLAND: Yes.

5 HEARING OFFICER BOUILLON: Thank you.

6 Turning now to page 130, discussion of
7 Legionnaire's Disease and bacterial growth in
8 cooling systems, I think the applicant has made
9 some fair comment here. We have already reviewed
10 the AFC section 8.9 in that matter, and the FSA
11 section 4.7 in that matter.

12 I'd ask Mr. Sarvey particularly on this
13 one item if you have any comment about the
14 proposed changes by the applicant. Basically they
15 want to strike the word undue risk and they want
16 to substitute, I believe, instead of identified
17 outbreaks, to correlated outbreaks. I think it's
18 just a slight speaking of watering systems, so
19 watering down the discussion.

20 Have you had a chance to review that,
21 Mr. Sarvey?

22 MR. SARVEY: No, I haven't. But my
23 feeling about these conditions in general, it's
24 really outside the scope of this proceeding, as
25 there should be an independent testing of the

1 applicant's water cooling system monthly. And
2 that's a condition I pressed for in almost every
3 proceeding that I've been in with recycled water.
4 To date I haven't seen it, but I wouldn't argue
5 with the applicant's word changing there.

6 But I would like to see something
7 inserted that the Commission or some outside
8 agency tests that water monthly to make sure that
9 there is no outbreak of Legionella. That's just
10 my only comment on that issue.

11 HEARING OFFICER BOUILLON: Does the
12 staff have any comment about this particular item?

13 MR. WORL: No, we don't have anything
14 additional to add to that. Nor do we have any
15 problem with the suggested change.

16 HEARING OFFICER BOUILLON: Mr.
17 Wheatland, I'd ask you if you have any support in
18 the record that you can point to for your comment?

19 MR. WHEATLAND: The comments that we
20 have made here are consistent with the
21 Commission's previously issued decision in the
22 Tesla Power Project at pages 210 to 211. We tried
23 to use language that would be consistent with how
24 the Commission has identified the problem in past
25 decisions.

1 HEARING OFFICER BOUILLON: Thank you.

2 The Committee will take that matter under
3 submission.

4 Turning now to page 171, there are some
5 typographical errors in the first sentence of the
6 verification for Cul-3, which will be made via the
7 errata.

8 Turning to page -- the first sentence of
9 verification will read, as corrected: At least
10 ten days prior to the start of project
11 construction, or changes related to vegetation
12 clearance for earth-disturbing activities, or
13 project site preparation. The project owner shall
14 provide an amendment to the cultural resources
15 monitoring and mitigation plan prepared by the
16 designated CSR to the CPM for review and
17 approval."

18 On page 200 dealing with condition Soil
19 and water-5, it appears from the comments that the
20 sixth well has been closed, and there is a letter
21 dated March 8th of this year that establishes
22 that. That letter would have occurred after the
23 close of evidence in this matter. It would seem
24 to me that that letter may well satisfy that
25 condition, soil and water-5, so I don't know that

1 there -- given the evidence of record in this
2 proceeding, I don't know that the explanatory
3 comment should be changed.

4 Mr. Wheatland, can you comment on that
5 further?

6 MR. WHEATLAND: No, we have no objection
7 to that, Your Honor. We just wanted the parties
8 to be aware that we had provided the information.
9 But we're not requesting a change.

10 HEARING OFFICER BOUILLON: And then the
11 applicant turns the typographical errors, and the
12 first thing he does is make a typographical error.

13 MR. WHEATLAND: No.

14 (Laughter.)

15 HEARING OFFICER BOUILLON: He cites page
16 62 meaning 162.

17 MR. WHEATLAND: 162, yes.

18 HEARING OFFICER BOUILLON: And then
19 points to an obvious typographical error where it
20 says verification twice in a row. One will be
21 removed.

22 Also on page 190, I believe that matter
23 has been -- was covered by the staff, also, I
24 believe. And I don't think we have any problem
25 with that. That's more grammatical than anything

1 else.

2 Now, before we turn to CARE's comments,
3 does anybody have any additional comments with
4 regard to any of the matters we've covered so far?
5 Mr. Wheatland?

6 MR. WHEATLAND: No additional comments.
7 Just to say that the applicant does concur with
8 all of the proposed changes by the staff.

9 HEARING OFFICER BOUILLON: Mr. Worl or
10 Mr. Ratliff?

11 MR. RATLIFF: No.

12 HEARING OFFICER BOUILLON: Mr. Sarvey?

13 MR. SARVEY: Yeah, no comments.

14 HEARING OFFICER BOUILLON: Now, let's
15 turn to CARE's comments. The first item in their
16 comments has to do with a bicycle path, and some
17 alleged damage to it. Let me first say that that
18 appears to be completely outside the evidence
19 taken in this proceeding.

20 Having said that, let me say that that's
21 a matter that concerns us. If, in fact, the
22 allegations -- I have received a letter, and I
23 don't know if anyone else has, dated March the
24 7th, from the Silicon Valley Bicycle Coalition.

25 Have you received that, Mr. Wheatland?

1 MR. WHEATLAND: No, Your Honor.

2 HEARING OFFICER BOUILLON: Let me hand
3 you my copy of it.

4 MR. SARVEY: I have a copy of it.

5 HEARING OFFICER BOUILLON: Excuse me?

6 MR. SARVEY: I have a copy of it for
7 him, and for staff, as well.

8 HEARING OFFICER BOUILLON: Mr.

9 Wheatland, get it from Mr. Sarvey.

10 MR. SARVEY: Do you need any more
11 copies, Mr. Bouillon, for --

12 HEARING OFFICER BOUILLON: I'd like you
13 to take a minute and read that, Mr. Wheatland,
14 because I'm going to ask you to comment on it.

15 (Pause.)

16 HEARING OFFICER BOUILLON: I've also
17 been handed by Mr. Sarvey just now a letter on the
18 letterhead of the California State Senate to Mr.
19 Bob Therkelsen, Executive Director, dated November
20 24, 2004, dealing with this same matter.

21 Given that Mr. Therkelsen was advised of
22 this matter back in November, I'd like -- well,
23 let's start with Mr. Wheatland anyway. Can you
24 comment on this matter?

25 MR. WHEATLAND: Yes, we would like to

1 comment. What I'd like to do is to ask Mr.
2 Tetzloff to address for you a little bit of the
3 history of this issue from Calpine's perspective.

4 MR. TETZLOFF: Yes, thank you. This
5 issue has been brought to our attention, I think,
6 from the Bicycle Coalition over a year ago. And
7 we've been working with them and with staff to
8 resolve the issue.

9 Presently we -- or most recently, as an
10 update, we had a site visit on the bike path with
11 representatives from PG&E, from Calpine and also
12 from the City, Mr. John Brazil, who is head of the
13 Parks and Recs Department of the City of San Jose.
14 And at that meeting we looked at what damage there
15 was and recognized that there were multiple
16 parties that used, or have used that road.

17 You know, there's been multiple
18 transmission lines installed along that path,
19 because there's transmission easements right
20 there.

21 So when PG&E installed their 115 kV
22 transmission poles, their trucks used that path
23 for access. As well as Silicon Valley Power for
24 their 230 kV lines.

25 We haven't been able to confirm whether

1 during the demolition of the existing or the
2 original site by Calpine's contractors, whether
3 that work involved having trucks on that path.
4 And we've heard from people that recollect that
5 there were.

6 So Calpine is interested in resolving
7 this matter. The bike path, itself, is on, I
8 believe, Caltrans' right-of-way. And it's a
9 little bit more -- there's a little more to it
10 than saying, okay, Calpine, just go ahead and send
11 somebody out there onto property that you don't
12 control, you don't have any rights to, and repair
13 a bike path.

14 So, from this meeting that we had last
15 month with the City and with PG&E, the action
16 items from that meeting was that the City was
17 going to take a look and see what their
18 maintenance plans were going to be for it.
19 Because the path, I believe, is around 15 years
20 old now. And that's about the time period where
21 they go in and resurface the road.

22 And we haven't heard anything back from
23 the City yet, but that's what we're waiting on, is
24 to find out from them what the plan is for that
25 road, and what the estimated repair costs will be.

1 And we've stated to the City that we'd
2 be prepared to participate in the cost for that.

3 HEARING OFFICER BOUILLON: Let me ask
4 you directly, was there some damage to the path
5 during the construction of the plant in the first
6 place?

7 MR. TETZLOFF: From --

8 HEARING OFFICER BOUILLON: You're not
9 under oath.

10 MR. TETZLOFF: Well, --

11 (Laughter.)

12 MR. TETZLOFF: -- I'm struggling with
13 how to answer that because from all the
14 discussions we've had internally and with the
15 construction staff, no one's been able to
16 identify, okay, yeah, we did have trucks on there
17 and we did have some damage.

18 There's all kinds of evidence and
19 photographs of the other utility trucks being on
20 that path during the transmission line
21 construction.

22 But I think one of the issues was that
23 it was done during the demolition. And we haven't
24 been able to confirm that we did have trucks on
25 that path at that point, or that it caused damage.

1 It's a path that is open to access from
2 Zanker Road. Once it meets up with our property,
3 after about a half mile, we've installed bollards
4 to stop any through traffic of vehicles beyond
5 that point. But it's open to any vehicle that
6 wants to use it at this point.

7 HEARING OFFICER BOUILLON: Mr. Worl, do
8 you have any comments about this matter?

9 MR. WORL: Yes. Number one, I would
10 like to say that Executive Director Therkelsen did
11 respond to Senator Figueroa's letter. I don't
12 have a copy of it with me, but I could certainly
13 provide it.

14 And basically that -- oh -- I asked my
15 ex parte staffer here, Mr. Sarvey, --

16 (Laughter.)

17 MR. WORL: -- but basically I believe
18 that this letter indicated that we were aware of
19 the problem. That we didn't see that there was a
20 basis for including it as part of the process that
21 we are currently engaged in.

22 And reiterating that the applicant and
23 Caltrans and PG&E, as well as the City of San
24 Jose, had been meeting with the intent of
25 resolving the issue, and also finding a means of

1 funding any restoration that was required.

2 And all of that has been occurring after
3 this letter was written. This letter was written
4 December 21, 2004. And the meetings have been
5 taking place up through February 10th of this
6 year.

7 As far as early on when this was first
8 brought to my attention, I was told that there was
9 photographic evidence that Calpine had, in fact,
10 been one of the responsible parties. I have never
11 seen that photographic evidence nor have I heard
12 mention of it since that point in time.

13 I can say that during the first
14 proceeding in 2001 the City of San Jose, once they
15 acquired the zoning responsibility for this parcel
16 from Santa Clara County, the first thing that they
17 did is ask an expedited demolition of all of the
18 facility, all of the buildings, old barns,
19 warehouses, houses, greenhouses that were on that
20 site, as an attractive nuisance.

21 And I do know that a contractor was
22 quickly hired by Calpine to do that demolition
23 after the City's formal request and the
24 Commission's acquiescence that it was probably
25 appropriate, given the status of the site at that

1 time. It was viewed as not being preconstruction.
2 It didn't involve ground disturbance. It was
3 solely the removal of the attractive nuisance
4 buildings that were on the site that were being
5 used inappropriately by various and sundry parties
6 in the area.

7 So, it's something that has a long
8 history. I do know that there was limited access
9 to the site because of the buildings at that time,
10 and that this path, this Caltrans right-of-way was
11 one of the few means of accessing the site.

12 But, again, there's no evidence other
13 than the photographs of the construction of the
14 transmission lines showing equipment on this area.

15 PRESIDING MEMBER PFANNENSTIEL: Mr.
16 Sarvey, do you know, since you're the one who
17 raised this, how long the bike path has been
18 damaged? How long this has been going on?

19 MR. SARVEY: I brought, or Rebecca Lucky
20 is here from the Silicon Valley Bicycle Coalition.
21 And I believe she would be the best one to address
22 that, if the Committee would like to hear from
23 her. I think she can give the other view of it.

24 Our, you know, with your pleasure I'd
25 like to have her speak to you.

1 PRESIDING MEMBER PFANNENSTIEL: Sure.

2 MS. LUCKY: Good morning.

3 HEARING OFFICER BOUILLON: Good morning.

4 PRESIDING MEMBER PFANNENSTIEL: Good
5 morning.

6 MS. LUCKY: My name is Rebecca Lucky and
7 I'm with the Silicon Valley Bicycle Coalition.
8 You asked a question regarding how long the path
9 has been damaged. It's been damaged, according to
10 (inaudible), I just got hired on in August 2004,
11 since the demolition project that Calpine was
12 constructing or doing at that time.

13 So, since then there's been numerous
14 commute time disruptions for the bicyclists that
15 are using that path. There's been flat tires.
16 It's very dangerous to be riding on that path.

17 I'm not sure how many people in this
18 room do ride a bicycle, but there is a strong
19 difference between riding a dirt bike and riding a
20 road bike to work. Obviously a road bike is going
21 to get you to work faster. But, however, you need
22 to have a very clear path that has, you know,
23 little obstructions.

24 And Calpine had basically demolished the
25 path to rubble, which makes it very difficult for

1 the cyclists to get to work on time, or without
2 any hazards.

3 I've been to one meeting. My board
4 members have been to other meetings. The
5 president has been to a meeting, Jim Stallman.
6 And we've just been getting just pretty much kind
7 of the run-around and doing things. John Brazil
8 is working on it, but it's not moving as far as it
9 should be going.

10 I mean we're asking Calpine to fix it
11 for as little as \$20,000, which seems like pennies
12 to me to get this project completed.

13 As far as -- this is the only path that
14 bicyclists have to be diverted away from the
15 freeway, so it's a really vital County-wide
16 bicycling path. And it has been designated as
17 that when it was built.

18 So the parties who are using it now,
19 it's pretty much free of charge. And so we
20 believe that the party who's responsible for
21 degrading that path should be responsible for
22 restoring it, as well.

23 And as far as we know, the bicyclists
24 have witnessed the demolition trucks from Calpine
25 are the ones who had made it into rubble.

1 PRESIDING MEMBER PFANNENSTIEL: Thank
2 you. So your understanding is that it was damaged
3 in 2001 coincident to the time of the demolition?
4 Is that --

5 MS. LUCKY: Yes.

6 PRESIDING MEMBER PFANNENSTIEL: You
7 weren't there at the time, but that's --

8 MS. LUCKY: No, I wasn't.

9 PRESIDING MEMBER PFANNENSTIEL: -- your
10 understanding of the timing of it?

11 MS. LUCKY: Um-hum.

12 PRESIDING MEMBER PFANNENSTIEL: Thank
13 you.

14 (Pause.)

15 PRESIDING MEMBER PFANNENSTIEL: I think
16 that we will take this issue under submission at
17 the moment. It does not appear that since it's
18 not in the record of this proceeding, it's not in
19 the evidentiary record, we are a little
20 constrained with dealing with it in this record.

21 However, we do have a phase 2 upcoming,
22 and if it's not resolved satisfactorily before we
23 begin the evidentiary record on phase 2, we'll
24 then bring it into that record.

25 HEARING OFFICER BOUILLON: Mr. Sarvey.

1 MR. SARVEY: Yeah, I'd like to comment
2 on that. We would have made this part of the
3 evidentiary record had the proper procedures for
4 docketing and service been filed.

5 This original letter from Silicon Valley
6 Bicycle Coalition was given to us on February 1,
7 2005. Apparently this issue had been going on
8 since October 22nd. And it's now our
9 understanding, I've been given several documents
10 here from Ms. Lucky, and apparently this has been
11 an ongoing issue within the proceeding, which we,
12 CARE, had no way of knowing.

13 So, we feel like, you know, there's
14 several submissions in the dockets that have not
15 been served on the parties. And we're aggrieved
16 by that. We don't feel that's proper. We feel
17 that this issue should be dealt with in this
18 proceeding.

19 There's people going back and forth on
20 this path now. It's an issue that needs to be
21 resolved within 30 days of this license. And this
22 is the one condition that we're very adamant that
23 we want in this decision, and we're willing to do
24 whatever it takes to get that in there.

25 And we don't think delaying this

1 proceeding is the proper way. We think the
2 applicant here has admitted that they have damaged
3 the path to the Committee. We believe the
4 Committee's purpose is to mitigate all impacts
5 from power projects.

6 And we would like to see that condition
7 adopted immediately. We don't want to see it
8 postponed. We have people who could be injured on
9 their way to work. They're on bicycles with small
10 tires. And this issue should be resolved
11 immediately. It should not be put off.

12 So, I would request that we deal with
13 it. We'd rather not file motions, interlocutory
14 appeals, whatever, and delay this proceeding over
15 this issue. We don't think it's that big of an
16 issue. We'd like to see Calpine do the good-
17 neighbor gesture and agree to adopt the condition.
18 And that's our position.

19 HEARING OFFICER BOUILLON: Thank you,
20 Mr. Sarvey.

21 Mr. Wheatland, do you have any response
22 to that?

23 MR. WHEATLAND: Well, yeah. It's
24 interesting that Mr. Sarvey mentions not delaying
25 the proceeding, because when his late-filed

1 intervention was accepted by this Committee, it
2 was under the express condition that he wouldn't
3 be raising issues to delay the proceeding.

4 He assured the Committee that there were
5 only certain specific issues with which he was
6 concerned. He assured the Committee that he had
7 reviewed the record of the proceeding and that he
8 wouldn't be raising extraneous issues, and that he
9 wouldn't delay the case.

10 So I think that the request that he's
11 making now is really out of order. And I agree
12 that this can be handled easily as part of phase
13 2.

14 MR. SARVEY: I'd like to respond to
15 that, if I could.

16 HEARING OFFICER BOUILLON: Mr. Ratliff,
17 you have something to say?

18 MR. RATLIFF: I hesitate to say
19 anything, but I mean I think this issue has kicked
20 around for more than six months. The Silicon
21 Valley Bicycle group has raised the issue early
22 on. And they seem to be caught in a kind of a
23 bureaucratic problem inasmuch as it's unclear who
24 has the responsibility to fix the bike trail. And
25 it's unclear who has the authority to do work on

1 Caltrans' property.

2 I think because it was unclear from the
3 outset whether it was the applicant's
4 responsibility to repair the bike path, that the
5 staff never really undertook it as an issue.

6 And in retrospect, given the length of
7 time that's passed with no repair of the trail, I
8 wonder if the staff shouldn't prioritize this as
9 an issue that they will address in phase 2; assign
10 someone to it to follow through on it; and to try
11 to make sure that if it isn't addressed earlier
12 than that, obviously it should be, that it's at
13 least addressed in phase 2 with a condition that
14 would be a condition that would not take effect
15 upon the conversion to a combined cycle, but
16 within some short time after the license was
17 granted so there wouldn't be some long interim
18 period before the condition could take effect.

19 At least then we could try to push for
20 some resolution, because it does seem to be like a
21 long-standing problem with no resolution.

22 MR. SARVEY: I'd like to respond to what
23 Mr. Wheatland said, if I could, please.

24 CARE did agree not to raise issues.

25 HEARING OFFICER BOUILLON: Mr. Sarvey,

1 could you speak up a little bit, please?

2 MR. SARVEY: CARE did agree not to raise
3 issues that were -- that we were aware of at the
4 proceeding. Because of docketing mishaps,
5 whatever, we weren't even aware of this issue.

6 We are now aware of it. We think it's
7 an important issue. We think health and safety is
8 at risk here. If Calpine would prefer to be sued
9 if some bicyclist gets hurt on this path, I think
10 that's a poor decision on their part.

11 And I think the Commission would also be
12 liable in that case. So, since this has been
13 raised in the public record. So I really think
14 Calpine should demonstrate that they're a good
15 neighbor and repair this path.

16 And if they believe that someone else is
17 responsible, they can achieve reimbursement from
18 them. But at this point the health and safety of
19 these bicyclists is at risk. And it's not an
20 issue that could be put off any longer. It needs
21 to be dealt with immediately.

22 PRESIDING MEMBER PFANNENSTIEL: I'd just
23 like to encourage Calpine to try to resolve this
24 before it comes up in phase 2. I think that we
25 sort of know what the issues are now, and we

1 understand that there are a lot of parties
2 involved. And I think it's going to take some
3 leadership to get it resolved. But I think it
4 shouldn't carry on for another length of time.

5 HEARING OFFICER BOUILLON: With respect
6 to the second area of CARE's comments regarding
7 the alternatives and efficiency of the project, I
8 think before we make any comment that I would like
9 both staff and applicant to comment on that
10 proposal on -- speaking now on page 2 of CARE's
11 comments, the paragraph after the condition
12 regarding the bike path, all the way through
13 energy resources-1.

14 Mr. Wheatland, I'll let you go first.

15 MR. WHEATLAND: We believe that CARE's
16 condition is completely unnecessary. It's an
17 issue that has been discussed at some length in
18 this proceeding already.

19 This facility has been licensed in
20 compliance with all applicable air quality laws
21 and standards. Those standards recognize that
22 this facility may operate within a range of hours.
23 But CARE has simply not provided any evidence on
24 this record that would show a need to limit the
25 operation of this plant to 5000 or 5500 or 4500

1 hours.

2 There's simply been no testimony that's
3 been offered, no evidence that's been proffered,
4 even though CARE had a full opportunity to do so.
5 And we really believe there's no justification on
6 this record whatsoever for the Commission's
7 consideration of this condition.

8 HEARING OFFICER BOUILLON: Mr. Worl or
9 Mr. Ratliff?

10 MR. RATLIFF: I take it you're asking
11 about the proposed condition to 5000 hours, this
12 cap of 5000 hours on efficiency?

13 HEARING OFFICER BOUILLON: I'm asking --

14 MR. RATLIFF: -- an efficiency standards
15 requirement?

16 HEARING OFFICER BOUILLON: More than
17 just the proposed condition I'm asking you about
18 your comments on the comment, itself, that
19 precedes that proposed condition.

20 MR. RATLIFF: Well, if you look at the
21 historical pattern of this plant's operation, it's
22 far below 5000 hours. And one would expect that a
23 peaker would probably run considerably less than
24 that.

25 And so if you were to impose such a

1 condition it would probably have no effect, which
2 might lead you to ask, well, why shouldn't we
3 impose the condition.

4 But, you know, I think none of us know
5 the answer to that. If you have a sudden surge in
6 demand and you need the plant to run more than
7 5000 hours, you may not want to limit the
8 flexibility for the facility to do so.

9 So, I mean, it just seems to me that it
10 wouldn't be advisable to add such a condition
11 without some further purpose. And I don't think I
12 know the purpose.

13 I think this Committee heard testimony
14 under efficiency standards that if you have a
15 peaker facility that is running a number of, you
16 know, being used in a baseload fashion, and it
17 becomes economic to convert it to a combined cycle
18 facility, and in fact, the applicant is seeking a
19 license to do so, so I would expect that if the
20 facility were to operate in a baseload fashion
21 that you would probably see it converted. It
22 wouldn't really be advisable for anyone to operate
23 it more than 5000 hours a year in a simple cycle
24 fashion.

25 So, it escapes me what the real purpose

1 of such a requirement would be.

2 HEARING OFFICER BOUILLON: Mr. Sarvey,
3 would you care to respond?

4 MR. SARVEY: Yeah. CARE believes that
5 since this project is currently operating under a
6 contract --

7 HEARING OFFICER BOUILLON: I'm sorry,
8 Mr. Sarvey, again I have to ask you to speak up.

9 MR. SARVEY: Yeah, CARE believes that --

10 HEARING OFFICER BOUILLON: Let me say
11 one other thing. That microphone does not amplify
12 your speech.

13 MR. SARVEY: Okay, I'm sorry. CARE
14 believes that since this project's operating under
15 a contract which is not allowed to be part of this
16 proceeding, their natural gas, et cetera, is being
17 paid for by the ratepayers of the State of
18 California.

19 In this original proceeding they were
20 licensed under expedited review provision, which
21 literally they made a binding agreement with this
22 Commission and with the people of the State of
23 California to convert this project to combined
24 cycle.

25 Now, in this proceeding, even though

1 they do have a license to convert to combined
2 cycle, there is no assurance that that will
3 happen. We don't know that.

4 So, considering this is the Energy
5 Resources and Conservation Commission, we believe
6 it's prudent, and it's been done in every other
7 peaker case that I've participated in, including
8 MEGS, Tracy Peaker Plant, and several others, it's
9 always limited a peaker plant to a certain number
10 of hours.

11 To allow a peaker plant to run 8760
12 hours with four turbines is an extremely large
13 waste of natural gas.

14 Now, this project, I mean in lieu of
15 that condition you could make a condition that
16 within three years they will convert this project,
17 which is consistent with the original intent of
18 section 25552. But if you choose not to ignore
19 what the Legislature's intent was when they
20 originally licensed this project, that's at the
21 Committee's discretion. But I believe this issue
22 is -- I mean you don't need much more of a reason
23 than under what this thing was originally licensed
24 under.

25 So, whatever the Committee decides on

1 that, we're willing to accept. But, there should
2 be some sort of condition in there to make sure
3 this project doesn't run continuously at 8760
4 hours, and define itself as a peaker plant.

5 HEARING OFFICER BOUILLON: Mr.
6 Wheatland, do you have something substantive to
7 add?

8 MR. WHEATLAND: Yeah, just substantive.
9 Even though this original application was
10 processed under an application for expedited
11 review, in fact the Commission gave this
12 application originally a full review under its
13 full licensing proceedings.

14 Also, this project was originally
15 licensed by the Bay Area Air Quality District
16 under those full licensing provisions.

17 And when we received the license it was
18 subject to a statutory constraint which was that
19 it had to be rebuilt as a combined cycle or
20 recertified. So we feel we have followed
21 completely the provisions of the Commission's
22 original decision, the statutory guidance, and
23 that we are in full compliance with the air
24 quality laws.

25 MR. TAYLOR: This is Gabriel Taylor,

1 staff engineer for air quality. I do have
2 something to add.

3 Air quality condition number 22 provides
4 a control on the long-term emissions of the
5 project. It's actually a rolling 8760 hour period
6 for control of NOx, VOC, CO, SOx, PM10 and
7 ammonia. Particularly the NOx annual limit, which
8 is 74.9 tons provides an effective limit on the
9 hours of operation per year, because it is a
10 rolling hourly average.

11 The air quality staff feels that that
12 provides an incentive to the applicant to run as
13 cleanly as possible, because the more cleanly the
14 facility operates the longer annual hours of
15 operation they have open to them.

16 HEARING OFFICER BOUILLON: The longer
17 maximum hours you could run?

18 MR. TAYLOR: That's correct. That NOx
19 limit is based on a 2.5 ppm average annual,
20 whereas their hourly limit for NOx is 5.0. So
21 therefore, a cleaner behavior pattern would lead
22 to more flexibility operationally for that
23 facility.

24 MR. RATLIFF: Could we just get Mr.
25 Taylor to indicate roughly how many hours of the

1 year it could operate with its current permit at
2 2.5 parts per million?

3 Because I mean it sounds like what Mr.
4 Taylor is saying is you have an effective
5 limitation on hours of operation through the air
6 quality permit, since you've got a cap on the
7 annual average.

8 And as I think CARE acknowledges in its
9 comments that cap will not allow the facility to
10 run 8000 hours per year.

11 HEARING OFFICER BOUILLON: I believe
12 that was in their briefs after the evidentiary
13 hearing, rather than their comments to this
14 decision. Mr. Sarvey, what do you have to say
15 about that?

16 MR. SARVEY: Well, first of all I
17 appreciate Mr. Taylor's input. But it has nothing
18 to do with the issue that we're speaking to, which
19 is energy resources. As far as air quality, yes,
20 I would agree with what he said.

21 As far as what Mr. Wheatland says, I
22 want to reiterate that the Commission originally
23 licensed this project with a binding agreement
24 with the Commission, Calpine and the citizens of
25 the State of California. The citizens of the

1 State of California are currently financing this
2 project through a Department of Water Resources
3 contract, which once again I say we're not allowed
4 to being up as an issue.

5 But I believe that it's very important.
6 And it's been -- if you want to take a look at the
7 MEGS decision, it clearly shows that the past
8 practice and past precedent is that peaker plants
9 are not allowed to run 8760 hours. And I've never
10 seen a peaker plant licensed by the Energy
11 Commission be allowed to run 8760 hours.

12 So I think, like I said, we're willing
13 to agree to whatever the Committee decides. We're
14 not going to press this issue. But we believe
15 that the precedent exists, and we don't see any
16 evidence in the record that running this project
17 would not be an inefficient waste of natural gas.
18 And common sense tells you that it would be. So,
19 I mean, that's our position.

20 HEARING OFFICER BOUILLON: Anything to
21 close, Mr. Wheatland?

22 MR. WHEATLAND: Could I just ask again,
23 Mr. Sarvey, to state what the precedent is that
24 exists? It isn't cited in his brief, so I'm --

25 MR. SARVEY: The MEGS decision, Mr.

1 Wheatland. It's right there, 03-SPPE-1.

2 MR. WHEATLAND: And what did that
3 decision say?

4 MR. SARVEY: That decision limited the
5 turbines to a combined total of 8000 hours. All
6 the turbines, selectively, added up. It did not
7 allow all four turbines to run 8000 hours. It
8 allowed the turbines to run in a combination of
9 the four -- two turbines -- in this case it's
10 four, which is even twice as much energy
11 consumption as the MEGS decision.

12 And that was the limitation put on by
13 the Commission. I believe it's appropriate.

14 MR. WHEATLAND: I don't have the
15 condition before me today. But I believe that Mr.
16 Sarvey is mischaracterizing the condition.
17 There's a lot more to it than that, and the
18 Committee will certainly have it available to look
19 at.

20 In any event, that's a proceeding that's
21 occurred several years after this project was
22 originally licensed. And what Mr. Sarvey has
23 failed to do is to show why the original license
24 for this proceeding needs to be modified or
25 limited, since we were in full compliance with all

1 the conditions set forth by both the Commission
2 and the District at the time that this project was
3 licensed.

4 MR. RATLIFF: Mr. Bouillon, I would also
5 encourage you to look at that decision. My own
6 recollection -- I wasn't involved in that case,
7 but my own recollection is that the Committee did
8 consider a cap on hours, but in the end did not
9 adopt one.

10 And that is the only case that I'm aware
11 of where the Commission has actually considered a
12 hard cap on peaker hours of operation. So you may
13 want to actually look to see what the decision
14 really says.

15 But, again, I would go back to the point
16 that our air quality witness has just made, and
17 CARE obviously agrees with, and by their own
18 briefs, there's no possibility that this facility
19 could run anything approaching that number of
20 hours without violating its air permit.

21 HEARING OFFICER BOUILLON: I think we've
22 heard enough on this issue. We will have some
23 discussion about it and take the matter under
24 submission.

25 Turning now to the air quality part of

1 Mr. Sarvey's or CARE's comments. Dealing with
2 beginning on page 98 of the PMPD, I'd like to note
3 one thing. On page 106 of the PMPD it refers to
4 a Commission discussion, and that should read
5 Committee discussion. There has been no
6 Commission discussion about these proceedings as
7 of yet.

8 But what I'd like to do, I think, to
9 start this proceeding, is to ask Mr. Wheatland to
10 briefly respond, ask Mr. Ratliff or Mr. Worl to
11 briefly respond. And then I'd like to hear both
12 from the staff person in charge of the air
13 quality, and I understand we have somebody here
14 from the Bay Area Air Quality Management District
15 who can maybe make some comments about CARE's
16 comments.

17 But, first ask Mr. Wheatland, do you
18 have any response?

19 MR. WHEATLAND: I'm going to give just a
20 very brief introduction, and I think you'll
21 benefit most from hearing from the District and
22 from the air quality experts that you have here
23 today.

24 But just very briefly, what the
25 applicant is asking for in phase 1 of this

1 proceeding is authority to continue the operation
2 of a facility that has already been fully
3 licensed and approved, both by the Commission and
4 the Air District.

5 What CARE is asking is that you would
6 rewrite the Commission's rules and the rules of
7 the Air Quality District to require that an
8 existing facility that is currently operating be
9 subject to a new and more stringent criteria for
10 BACT during the operation of that facility.

11 And we submit simply that there's no
12 authority for that. There's no legal requirement
13 for that. And it would be completely unjustified.

14 The current permit we have, the District
15 will tell you, it continues to be valid. And that
16 there's no requirement under their rules that it
17 would be subject to a new and more stringent BACT
18 level; a level that, indeed, might require this
19 facility to be shut down and reconfigured if we
20 were to have that kind of condition imposed.

21 So that's the overview from the
22 applicant's perspective. And I'd like you to hear
23 later from both the District and from the air
24 quality experts.

25 HEARING OFFICER BOUILLON: Mr. Ratliff

1 or Mr. Worl, do you have any comment?

2 MR. RATLIFF: I think I will hold my
3 comments for later, if I may. I'd like to respond
4 to other comments.

5 HEARING OFFICER BOUILLON: I think we'll
6 start with the District's representative. Would
7 you identify yourself for the record, please.

8 MR. HILL: Yes. My name is Steve Hill,
9 and I'm the Manager of Permit Evaluation for the
10 Bay Area Air Quality Management District. And I'm
11 here to respond to any questions that you might
12 have of me.

13 HEARING OFFICER BOUILLON: Have you had
14 an opportunity to review the comments made by CARE
15 in this regard?

16 MR. HILL: I have looked at them
17 briefly.

18 HEARING OFFICER BOUILLON: And have you
19 reviewed the Presiding Member's Proposed Decision
20 in this case?

21 MR. HILL: Yes, I have.

22 HEARING OFFICER BOUILLON: And have you
23 reviewed the final staff assessment prepared by
24 our staff?

25 MR. HILL: Yes, I have.

1 HEARING OFFICER BOUILLON: And are you
2 familiar with your own District's workings with
3 regard to this particular plant?

4 MR. HILL: Yes, I am.

5 HEARING OFFICER BOUILLON: The Committee
6 would appreciate it if you would give us your
7 views about CARE's comments, and our proposed
8 decision with regard to air quality, in general.

9 MR. HILL: All right. The first thing I
10 want to talk about briefly is there was some
11 discussion about a document that CARE had pulled
12 from our website on current best available control
13 technology guideline. And I'm not familiar with
14 the document that they submitted, but I pulled a
15 copy of ours off the website, so that, you know, I
16 can attest to its validity, if that would be
17 helpful to the Commission.

18 HEARING OFFICER BOUILLON: I don't think
19 were particularly concerned with the document,
20 itself, --

21 MR. HILL: All right.

22 HEARING OFFICER BOUILLON: -- but rather
23 the contentions made about that document.

24 MR. HILL: All right. Currently, our
25 current best available control technology

1 determination or achieved in practice for this
2 kind of unit is 2.5 parts per million.

3 HEARING OFFICER BOUILLON: Is what?

4 MR. HILL: 2.5 parts per million.

5 HEARING OFFICER BOUILLON: Okay.

6 MR. HILL: That is the best available
7 control technology floor that we would begin at if
8 we were reviewing a new project that came in the
9 door at this time.

10 Under our rules the best available
11 control technology that is available as of the
12 date that the application to construct is
13 submitted to us is the one that applies. And we
14 have two levels of best available control
15 technology. We have achieved in practice, that is
16 something that has been demonstrated somewhere as
17 being reliably capable of achieving that goal.
18 And that's what's reflected here, the achieved in
19 practice. This has been achieved elsewhere. And
20 as of July 18, 2003, that had been achieved in
21 practice.

22 We also have best available control
23 technology, another subdefinition of best
24 available control technology that is
25 technologically feasible and cost effective. And

1 that requires a case-by-case analysis in order to
2 look at that.

3 What's been talked about here is our
4 determination that as of July of 2003 the best
5 available control technology for a new simple
6 cycle turbine would be 2.5 parts per million.

7 Now, we would not apply that level to
8 this project, because this project, this facility
9 already exists. And best available control
10 technology, under our rules, is triggered by a
11 modification or new source. This is neither a
12 modification nor a new source under our
13 regulations. We would not apply this standard.

14 Best available control technology is
15 intended to be applied at a time when the project
16 is undergoing major modification, change in the
17 way it operates. Because the theory is that the
18 best time to install controls is when the facility
19 is being revamped or being installed in the first
20 place. It's more economical to do it.

21 This is not a level that we would apply
22 to this facility retroactively after the facility
23 had already been constructed unless they were
24 modifying it.

25 So that's the best available control

1 technology piece of it. So shall I stop there?

2 Okay.

3 Well, actually I think that's the thrust
4 of the discussion here, whether or not the
5 District, or whether or not this best available
6 control technology requirement is applicable to
7 this source. It's not under district regulations,
8 and I can't speak to the Commission's
9 requirements. But under the District's rules this
10 is not an appropriate standard to be applying to
11 this particular project.

12 HEARING OFFICER BOUILLON: So is it fair
13 to say then that you agree with the PMPD with
14 regard to the --

15 MR. HILL: Yes, there --

16 HEARING OFFICER BOUILLON: -- part of it
17 that says BACT does not apply to this relicensing?

18 MR. HILL: Under the District's rules,
19 yes. To just limiting my opinion to the
20 District's requirements, yes, that is correct. I
21 would agree with that.

22 HEARING OFFICER BOUILLON: And if it
23 were a new plant, or there was some substantial
24 modification then BACT would come into play?

25 MR. HILL: That is correct.

1 HEARING OFFICER BOUILLON: Does staff
2 have anything to add to that?

3 MR. RATLIFF: Well, I think I suspect
4 what we're going to hear from Mr. Sarvey is that
5 the District rules are not the rules that really
6 are the pertinent requirement. The pertinent
7 requirement is 25552, a provision which allows the
8 recertification of this facility.

9 And it does so -- in the same sentence
10 it says subject to BACT, best available control
11 technology.

12 There is, in staff's view, nothing in
13 that requirement which suggests that you then go
14 back and apply BACT as it exists today, as opposed
15 to when the original plant was certified.

16 But I think that's really what CARE is
17 reading into the statute, is that BACT should
18 apply as of the date of recertification, rather
19 than as of the date of the original licensing.
20 So I think that really is the nub of the question.

21 I've looked at the, you know, the
22 legislative record of this proceeding, and there's
23 nothing that addresses that issue one way or
24 another. I think it's -- there are public policy
25 reasons which make that, I think, a questionable

1 conclusion, given the fact that you have to close
2 down such facilities to retrofit them to a new
3 standard that may have been imposed in the
4 interim. And that would be the case here.

5 But, certainly I think the District's
6 rules reflect what would be the correct public
7 policy, which would be to require retrofit to BACT
8 when there is a major modification.

9 Mr. Taylor would also like to add
10 something to my colloquy if he can, if that's
11 permissible.

12 HEARING OFFICER BOUILLON: I'm sorry, I
13 couldn't hear you, Mr. Ratliff.

14 MR. RATLIFF: Mr. Taylor, our air
15 quality witness, apparently has something to say
16 about this as well.

17 MR. TAYLOR: This is Gabriel Taylor.
18 Staff does not analyze or set BACT for facilities.
19 It's the Air District's responsibility to do so.
20 Staff will review a BACT determination to confirm
21 that it is applied correctly with regards to the
22 District's rules to hopefully avoid any
23 disagreement between the District and the federal
24 EPA.

25 In this case the staff believes the

1 District is correctly applying the rules to
2 determine BACT for the phase 1 simple cycle Los
3 Esteros project.

4 HEARING OFFICER BOUILLON: Thank you.
5 Mr. Sarvey, do you have a response to --

6 MR. SARVEY: Yeah.

7 HEARING OFFICER BOUILLON: -- the
8 comments you've heard?

9 MR. SARVEY: Thank you. First of all,
10 I'm glad that it's cleared up that best available
11 control technology at the current time is 2.5 ppm.
12 And we suggest that the Commission decision be
13 changed as such.

14 Second of all, as far as the District
15 rules, we do not believe the District rules apply,
16 but contrary to what Mr. Ratliff said, we do
17 believe section 25552 does apply. And we also
18 know that the legislative history does not inform
19 us one way or another how that determination is to
20 be made by the Commission. So that's pretty much
21 up to the Commission.

22 But we feel that the Commission is bound
23 by the Warren Alquist Act, as we've now
24 established that this is a law, ordinance,
25 regulation and standard of 2.5 ppm. That this is

1 a new application, this is not a modification,
2 this is not an amendment.

3 The Warren Alquist Act states that the
4 Energy Commission must make the project comply
5 with all laws, ordinances, regulations and
6 standards that exist at the time of licensing.
7 And this is the time of licensing. Before is not
8 the time of licensing. This is a new license.

9 So hard cheese to the applicant, but,
10 you know, that's what the law says. And there's
11 no dispute now on the record that 2.5 ppm is the
12 standard. So the Energy Commission must comply
13 and make the applicant comply. It's cut and
14 dried. There's nothing else really to look at.

15 HEARING OFFICER BOUILLON: All right, we
16 will --

17 MR. HILL: May I make a comment on that?

18 HEARING OFFICER BOUILLON: Yes.

19 MR. HILL: If the standard -- if the
20 origin of the standard is the Air District's
21 rules, this standard does not apply to this
22 project. I'm trying to say that as clearly as I
23 can.

24 The District's rules would not apply
25 this standard to this project. This is a standard

1 that applies to new pieces of equipment or
2 projects that are being physically modified so
3 that they increase emissions.

4 HEARING OFFICER BOUILLON: Thank you,
5 Mr. Hill. I think the Committee understands
6 that. We will take that matter under
7 submission, also.

8 Turning to the last area of CARE's
9 comments, the environmental justice issue, it's
10 part of the same issue. But I would like to have
11 staff and applicant both make whatever response
12 they think is appropriate to that for the record.

13 MR. WHEATLAND: Well, very briefly the
14 staff's opening brief in this proceeding actually
15 summarized the issue quite well. The concept of
16 environmental justice derives from federal
17 executive order applied to federal projects and
18 federal activities. It's really not even an
19 applicable standard to a state action or a state
20 facility.

21 But even assuming for the moment solely
22 for the sake of argument that it were, what the
23 federal executive order and the implementing
24 guidelines from the EPA are very clear about is
25 it's talking about a disproportionate impact of

1 some significance, what they call a high impact.

2 So in order to find a violation of an
3 environmental justice principle, you must first
4 find that there is a significant impact that
5 impacts a certain population disproportionately.

6 In this instance the PMPD finds that all
7 significant impacts from the project have been
8 mitigated or will be mitigated to a level of
9 insignificance. Therefore, the PMPD was correct
10 in concluding that the principles in environmental
11 justice have not been abridged by this project.

12 HEARING OFFICER BOUILLON: Mr. Ratliff,
13 do you have something to add?

14 MR. RATLIFF: Well, I would agree with
15 those comments with one difference. We think that
16 environmental justice does apply to state projects
17 because of state laws that have been enacted since
18 the principles enunciated by EPA came into effect.
19 So we feel that environmental justice principles
20 do apply to state projects.

21 But we also would go on to say that we
22 agree that the effects of this project clearly
23 have been mitigated to levels of less than
24 significant, as a matter of state law. And that
25 as such, there can be no environmental justice

1 problem that results from this project.

2 HEARING OFFICER BOUILLON: Excuse me,
3 Mr. Sarvey, I'm going to ask you to respond, but
4 I'd like to have just a moment first.

5 With regard to the issue we just
6 previously discussed about BACT I want to inform
7 Mr. Sarvey and CARE, in general, that we have
8 retrieved from dockets the letter dated December
9 16, 2004 from the United States EPA that he cited
10 in his comments.

11 And the Committee will review that
12 letter for any applicability that it may have to
13 his arguments.

14 But now turning back to environmental
15 justice, Mr. Sarvey, do you have anything
16 substantive to add to the comments you've already
17 made?

18 MR. SARVEY: Yeah, I believe the key
19 words were supplied by Mr. Wheatland here. He
20 said will be mitigated. At this point this
21 project's been operating for almost two years
22 without proper PM10 mitigation in place. And
23 that's the purpose of the SO2 credits that staff
24 is requiring them to supply. And they've agreed
25 to do so.

1 At this time this project is still
2 operating out of compliance with condition AQSC-4
3 of the original decision which to date has not
4 been overturned.

5 So staff believes environmental justice
6 applies. We agree. The project's not mitigated.
7 Staff defined it as a significant impact.
8 Obviously they're requiring the SO2 credits to
9 mitigate it. We agree, although we think the form
10 of mitigation should be different. But that's not
11 the issue here.

12 So, this project's been out of
13 compliance for over a year. Nothing's been done
14 about it. Hasn't been a fine. The project hasn't
15 been shut down. The original decision defined
16 this as a significant impact under CEQA.

17 So if a project is operating for a year
18 out of compliance with a condition that's
19 necessary to prevent significant impact under CEQA
20 there has to be some consequence.

21 So, that's up to the Committee what that
22 consequence is, but they should be fined for
23 violation of a condition of certification; or in
24 the alternate, found that there is an
25 environmental justice issue and a supplemental

1 environmental project should occur in the low
2 income neighborhood of the people who are affected
3 by this.

4 So that's CARE's position. We will --
5 whatever the Committee decides on that, we're in
6 agreement. And that's all we have to say about
7 it.

8 HEARING OFFICER BOUILLON: Mr. Worl, if
9 I might inquire of you, what is the schedule for
10 the surrender of those emission reduction credits?

11 MR. WORL: The additional credits?

12 HEARING OFFICER BOUILLON: Yes.

13 MR. WORL: I'm afraid I'd have to defer
14 to Gabe or to Steve Hill for that. But, my
15 understanding from discussions was that, in fact,
16 the current project has been mitigated. Gabe is
17 pointing out here what -- okay.

18 MR. TAYLOR: Reading from the PMPD,
19 condition AQ-SC-4 requires the submittal of the
20 additional SOx credits. The timeline is listed as
21 the owner/operator shall surrender all ERCs within
22 three months of the date of the final Commission
23 decision, or the effective date of the license,
24 whichever is later.

25 Does that answer the Committee's

1 question?

2 HEARING OFFICER BOUILLON: Excuse me?

3 MR. WHEATLAND: I just wanted to add
4 that Mr. Sarvey's opinion that the applicant has
5 violated a condition of certification is simply
6 that, it's his opinion.

7 The record in this proceeding will
8 reflect that there was a disagreement between the
9 parties as to whether or not there was full
10 compliance with the Commission's condition
11 regarding the mitigation program that was
12 administered.

13 But in order to resolve that
14 disagreement without having to reach the ultimate
15 question, the parties agreed on a mitigation plan
16 including the surrender of the credits. But the
17 ultimate question was not an issue that has been
18 litigated in this proceeding. It's not an issue
19 that Mr. Sarvey chose to present any testimony or
20 evidence on, although they were offered the
21 opportunity to do so. And I think it would be
22 incorrect to conclude that there's been any
23 violation.

24 What is correct to conclude is that
25 there was a disagreement among the parties that

1 has been resolved by a compromise to which we have
2 agreed with the staff.

3 HEARING OFFICER BOUILLON: Mr. Sarvey,
4 with respect to air quality SC-4, it would seem
5 that the thrust of your comment has to do with the
6 timing of the surrender of those credits, is that
7 correct?

8 MR. SARVEY: Partially.

9 HEARING OFFICER BOUILLON: You object to
10 the three-month period of time from the date of
11 the license?

12 MR. SARVEY: The crux of our comment is
13 that the project's been operating for over almost
14 a year now without the mitigation in place, which
15 we feel --

16 HEARING OFFICER BOUILLON: I understand
17 that.

18 MR. SARVEY: -- is an environmental
19 justice issue. And we're not concerned with -- we
20 don't even believe the SO2 credits will resolve
21 the issue, but that's outside the scope of what
22 we're discussing here.

23 And once again, this is cut and dried.
24 You got a condition from a previous licensing of
25 this project which staff has said, and the

1 decision said, is a significant impact under CEQA.

2 Now, if the applicant didn't believe it
3 was, then he should have gone into the evidentiary
4 hearing instead of agreeing with staff, and argued
5 that it wasn't.

6 So Mr. Wheatland's comments hold no
7 water in our opinion.

8 HEARING OFFICER BOUILLON: Thank you.
9 We will take that matter under submission, also.

10 That concludes all of the comments. I
11 don't see anyone here from the public, but I'll
12 ask anyway. Does any member of the public have
13 any comments they wish to make about this
14 proceeding?

15 Hearing none, Mr. Sarvey.

16 MR. SARVEY: I have a couple procedural
17 issues that I want to address, if I could, please.

18 HEARING OFFICER BOUILLON: Go ahead.

19 MR. SARVEY: One is our granting of
20 financial hardship. CARE has still not been
21 granted financial hardship, even though we have --

22 HEARING OFFICER BOUILLON: You haven't
23 appealed that to the entire Commission. I'm not
24 sure what the effect of it is. It has really to
25 do simply with the requirement of preparing

1 multiple copies of documents that you filed, is
2 that correct?

3 MR. SARVEY: Well, it's important to us.

4 HEARING OFFICER BOUILLON: Excuse me?

5 MR. SARVEY: It is important to us and
6 we thought we had an agreement with Your Honor
7 that it would happen without an appeal to the
8 Commission. And we'd like to resolve it now,
9 because we feel financial hardship is very
10 important to us.

11 HEARING OFFICER BOUILLON: All right.
12 As noted in --

13 MR. SARVEY: So we'd rather have it
14 dealt with at the Committee level. We don't
15 really want to take valuable business meeting time
16 up on an issue like that.

17 HEARING OFFICER BOUILLON: I understand
18 that. With respect to that, I think at this point
19 that is important really as to phase 2, and we
20 will deal with it. I have a procedural matter in
21 that regard to discuss with you, and I think that
22 even within the context of ex parte communication,
23 since this is a procedural matter, I can discuss
24 that with you after this hearing. In fact, right
25 at its conclusion, if you would like.

1 MR. SARVEY: Okay.

2 HEARING OFFICER BOUILLON: Just as a
3 procedural matter. We do understand your concern
4 and I noted it in your comments, also.

5 But you had one other item?

6 MR. SARVEY: Yeah, the other issue I had
7 was we seem to be having a problem and I discussed
8 with the staff attorney here, as well, that
9 there's certain documents that are being submitted
10 that even staff attorney doesn't have. One being
11 the response to Liz Figueroa from Robert
12 Therkelsen. He, himself, did not have possession
13 of these documents.

14 So there's obviously a breakdown in the
15 dockets office in the service list. So I would
16 like the Committee to investigate that. I
17 recently got seven documents that I didn't have in
18 my possession that I had to go petition dockets
19 for, so that's an issue that I would like the
20 Committee to look into if possible. Thank you.

21 HEARING OFFICER BOUILLON: I think with
22 respect to those issues you may have some valid
23 criticisms in that regard. I would suggest you
24 take them up with Mr. Therkelsen, the Executive
25 Director, who really is responsible for the

1 dockets office, as opposed to this Committee.

2 PRESIDING MEMBER PFANNENSTIEL: Any
3 other comments or issues that should be brought up
4 to the Committee for consideration?

5 With that I would like to thank the
6 representative from the Air District, Mr. Hill,
7 for both being here and providing some clarity to
8 an issue that we've been struggling with. Thank
9 you for coming.

10 Hearing no other comments, then the
11 Committee Conference is adjourned.

12 (Whereupon, at 11:30 a.m., the Committee
13 Conference was adjourned.)

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CERTIFICATE OF REPORTER

I, PETER PETTY, an Electronic Reporter,
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herein; that I recorded the foregoing California
Energy Commission Committee Conference; that it
was thereafter transcribed into typewriting.

I further certify that I am not of
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conference, nor in any way interested in outcome
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IN WITNESS WHEREOF, I have hereunto set
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